UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

STEPHEN BERRY,	)	
	)	
Plaintiff	)	
	)	
v.	)	*Civil No. 88-0281 P*
	)	
C.N. BROWN COMPANY,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This is an action alleging violations of federal and state anti-trust laws, the federal Petroleum Marketing Practices Act, 15 U.S.C. ' ' 2801-41, and the Maine Motor Fuel Distribution and Sales Act ("Act"), 10 M.R.S.A. ' ' 1451-57. The plaintiff at this time seeks summary judgment limited to liability on Counts IV and V which allege violations of the Act.

Pursuant to Fed. R. Civ. P. 56(c) the court shall render summary judgment if there remains "no genuine issue as to any material fact" and if "the moving party is entitled to a judgment as a matter of law."

The following facts are not in dispute. The plaintiff has operated a two-bay service and retail gas station in Auburn as a sole proprietorship under the name Main Street Mobil since October, 1985 pursuant to three different but successive contracts with the defendant which owns the premises and facilities. The agreement currently in effect was entered into on March 3, 1988 and is titled "Retail Lease and Security Agreement." The defendant is denominated therein as the lessor and the plaintiff as the lessee. The plaintiff is charged with a monthly rental of $25. Consistent with the prior agreements, the current agreement provides that the plaintiff is to sell the defendant's Mobil brand

motor fuel products, which it delivers to the plaintiff's station on a consignment basis, at retail prices determined by the defendant and is to pay the defendant the full retail price for each gallon sold, less a commission of 4 cents per gallon. All of the agreements likewise provide for a non-interest bearing security deposit equal to the product of the current retail value of motor fuels multiplied by the gallonage capacity of all storage tanks on the leased premises. The security deposit is derived by withholding a specified amount of the commission due the plaintiff on motor fuel sales until the full amount of the deposit is in hand.[1] The deposit serves as security for the payment of any of the plaintiff's financial obligations to the defendant under the agreements. It is not used as an advance for the payment of motor fuel. The defendant has never paid the plaintiff any interest on the security deposit which, as of December 31, 1988, totalled $4,767.34.

The agreements also provide, *inter alia*, that the plaintiff, as the defendant's agent selling for its account, is not and has no rights as a "franchisee" under the federal Petroleum Marketing Practices Act or any similar state or general statute; that the defendant may terminate the agreement if the plaintiff defaults on any of the covenants contained therein; and that neither party intends to violate statutory or common law and if any provision thereof is in violation of any law it shall be inoperative leaving the remainder of the agreement binding unless either party judges the remaining portions inadequate to define their rights and obligations, in which event the party making such determination shall have the right to terminate the agreement. None of the agreements includes the following provision:

> Price fixing or mandatory prices for any products covered in this agreement is prohibited. A service station dealer or wholesale

[1] The agreement with a September 1, 1987 commencement date does not reflect an amount to be withheld. This appears to be an oversight.

> distributor may sell any products listed in this agreement for a price which he alone may decide.

In each of the years since 1985, the total retail sales of Main Street Mobil have exceeded $280,000 of which at least $240,000, or 81% of the total, have been attributable to gasoline sales. During the entire period of their business relationship, the defendant has set or attempted to set the retail price for gasoline sold by the plaintiff. In July, 1988 the plaintiff began to set the retail price himself. In response, the defendant attempted to terminate the agreement and to evict him.

In Count IV of the Complaint the plaintiff asserts a violation of ' 1454(1)(C) of the Act resulting from the defendant's insistence on setting the retail price. In Count V the plaintiff alleges that the March 3, 1988 agreement specifically violates the Act by:

> (1) providing in paragraph 2(f) for the waiver of the plaintiff's rights and claims contrary to ' 1454(1)(B);
>
> (2) failing to include the anti-price-fixing statement mandated by ' 1454(1)(C); and
>
> (3) requiring on page 3 of the face page and in paragraph 30 that the plaintiff make a cash deposit to the defendant without interest being paid thereon contrary to ' 1454(1)(E).[2]

[2] The plaintiff alleges that the agreement violates the Act "in a number of ways" and goes on to specify, but without limitation, the three specific instances noted in the text. Complaint & 41. For purposes of this summary judgment motion, I consider only the three specifically asserted violations as before the court at this time.

The first inquiry is whether the three agreements are franchise agreements within the meaning of the Act and the coverage of the nonwaivable provisions of ' 1454(1)(A)-(F). The defendant apparently does not dispute that during the entire period of their relationship the plaintiff has been a "retail dealer" and the defendant a "distributor" as defined in the Act.[3] A "franchise agreement" as defined in the Act includes any written agreement, such as a lease and security agreement, between a distributor and a retail dealer under which the retail dealer is granted the right to occupy premises owned by the distributor.[4] It necessarily follows that, on the undisputed facts of this case, all three of

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[3] "Retail Dealer" shall mean any person who operates a service station, filling station, store, garage or other place of business for the sale of motor fuel for delivery into the service tank or tanks of any vehicle propelled by an internal combustion engine.

10 M.R.S.A. ' 1453(11).

"Distributor" shall mean any person engaged in the sale, consignment or distribution of petroleum products to wholesale or retail outlets, whether or not such person owns, leases or in any way controls such outlets.

10 M.R.S.A. ' 1453(3).

[4] "Franchise agreement" shall mean any written or oral agreement, for a definite or indefinite period, between a refiner and a retail dealer or between a distributor and a retail dealer or between a refiner and a distributor under which:

A. A retail dealer or a distributor promises to sell or distribute the product or products of the refiner; or

B. A retail dealer or a distributor is granted the right to use a trademark, trade name, service mark or other identifying symbol or name owned by a refiner; or

C. A retail dealer or distributor is granted the right to occupy premises owned, leased or controlled by a refiner or distributor.

the agreements entered into between the parties are franchise agreements within the meaning of the Act, and the defendant does not appear to contend otherwise.

Section 1454(1) of the Act provides, in relevant part, that:

> When a franchise agreement between . . . a distributor and a retail dealer covers more than 35% of the retail dealer's gross sales and such gross sales are more than $30,000 annually, every such franchise agreement shall be subject to the nonwaivable provisions set forth in this subsection, whether or not they are expressly set forth in the agreement.

The defendant argues that implicit in this coverage qualifying language "is the requirement that the dealer is making retail sales of products that he owns and that he has purchased for resale." Defendant's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment at 4. By virtue of the consignment arrangement of the parties, contends the defendant, the plaintiff does not have any "gross sales" of gasoline. In staking out this defense the defendant ignores the statement of legislative findings and purposes contained in ' 1452, the disjunctive use of "consignment" in the definition of "distributor," the broad scope of the definition of "retail dealer" and the Law Court's tacit rejection of its position in *Webber Oil Co. v. Murray*, 551 A.2d 1371 (Me. 1988).

In brief, the Maine Legislature purposefully sought to promote reasonable retail motor fuel prices and better assure motor fuel supplies to all areas of Maine in part through increased competition among retailers independent of major distributors. It determined that this objective could be achieved only by defining and regulating the relationship between parties to franchise agreements as defined in the Act and to prescribe other trade practices. The Act specifically contemplates that a distributor might, like the defendant, be engaged solely in the consignment of gasoline to a retail outlet which it owns and leases out. Likewise, a retail dealer can be a person who, like the plaintiff, operates,

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10 M.R.S.A. ' 1453(4).

but does not own, a service station of the kind involved here and does not own the motor fuel products sold there.

The salutary purposes underlying adoption of the Act would be easily defeated if by simply consigning motor fuel to a retail dealer a distributor could cause the sale of that fuel from the retail dealer's establishment to be excluded from the retail dealer's "gross sales" for purposes of ' 1454(1). Under such a scenario the distributor continues to exercise all of the control over retail dealers that the Act sought to wrest from it, and the healthy competition among independents deemed critical to reasonable prices and adequate statewide distribution of supply is stifled. A fair reading of the Act indicates that it contains no such loophole. The more reasonable interpretation of the "gross sales" provision is that it means gross sales generated at the place of business operated by the retail dealer for the sale, among other things, of motor fuel for delivery into the service tank of a vehicle propelled by an internal combustion engine. *See Webber Oil Co.*, 551 A.2d at 1373. The "gross sales" provision of ' 1454(1) does not exclude consignment distributors but rather represents the Maine Legislature's judgment that only franchise agreements which cover a certain volume of sales should be subject to the nonwaivable provisions of ' 1454(1)(A)-(F). Because the plaintiff's business activity during each year the franchise agreements have been in effect has exceeded the statutory qualifying threshold, the nonwaivable provisions have applied throughout the parties' relationship, including the present.

Having determined that the parties and all three franchise agreements have always been subject to ' 1454(1)(A)-(F), it is clear from the undisputed facts that the price-setting terms appearing in each contract, providing that the defendant either shall establish or will determine the retail price at which its motor fuel is sold to the public, directly contravene the anti-price-fixing provisions of ' 1454(1)(C), as does the defendant's conduct in fixing and attempting to fix such prices and in attempting to enforce its exclusive price fixing mandate by seeking to terminate the plaintiff after he began to set his own prices

in July, 1988.[5] It is also clear as a matter of undisputed fact that these franchise agreements do not include the anti-price-fixing legend mandated by ' 1454(1)(C). Likewise, the failure of the defendant ever to have paid the plaintiff any interest on his security deposit constitutes a violation of ' 1454(1)(E).[6] The fact that paragraph 23 of the two most recent franchise agreements states that any provisions thereof which violate any law shall be inoperative does not absolve the defendant from any of these violations. Indeed, the defendant has acted, or failed to act, in accordance with the price-

[5] The defendant points out the anomalous result produced by this conclusion: the plaintiff appears to be free to sell the defendant's gasoline at whatever retail price he decides -- including a below-cost price -- and is entitled to a 4 cent per gallon commission no matter what the price. This consequence flows not from any peculiar provision of the Act but rather from the way in which the defendant chose to structure its relationship with the plaintiff despite the fact that at the time the parties entered into their first contract in late 1985 the Act had already been in effect almost ten years.

[6] As noted earlier, the plaintiff specifically alleges in his complaint that the current agreement violates the Act by requiring him to make a cash deposit to the defendant as to which the agreement expressly provides that no interest shall be earned or credited to his benefit. Section 1454(1)(E) provides only that, if such an agreement requires the franchisee to provide a cash deposit other than as an advance for product ordered, the franchisor shall pay interest thereon at least annually at the rate of at least 6%. Thus, the agreement does not contravene the Act simply because it requires the plaintiff to provide a cash deposit and provides that no interest will be paid thereon. However, I treat the plaintiff's complaint as nevertheless alleging a violation of ' 1454(1)(E) resulting from the defendant's failure to pay interest on the security deposit as required thereby.

fixing and no-interest provisions. The violation of ' 1454(1)(C) results from the absence, not the presence, of contract language.

Finally, the plaintiff argues that the current franchise agreement also violates ' 1454(1)(B) in that it provides, at paragraph 2(f), for the plaintiff's waiver of rights and claims. Paragraph 2(f) explicitly states that the plaintiff is not and does not have the rights of a "franchisee" under any statute. However, what ' 1454(1)(B) makes unlawful is the inclusion in a franchise agreement of "any provision which in any way limits the right of either party to trial by jury, the interposition of counterclaims or crossclaims." Paragraph 2(f) does no such thing. Nor does any other provision of the agreement.

For the foregoing reasons, I recommend that the plaintiff's motion for partial summary judgment on liability only as to Counts IV and V be ***GRANTED*** as to all liability claims specifically asserted therein, except the Count V claim that the current franchise agreement violates ' 1454(1)(B) of the Act as to which I recommend that the motion be ***DENIED***. In making this recommendation, I have in no way addressed and intimate no opinion on the plaintiff's claim of entitlement to punitive damages under each Count, viewing such claim, as well as all other damage claims and the issue of appropriate remedy, as beyond the scope of the motion.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 4th day of August, 1989.

David M. Cohen
United States Magistrate